FILE COPY

FILED
MAR 24 19

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

BRIEF ON BEHALF OF PETITIONERS-APPELLANTS.

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners-Appellants,
10 East 40th Street,
New York City,
New York.

THE BALLOU PRESS NEW YORK

INDEX.

	PAGE
A. Opinions in Courts Below	1
B. Jurisdiction of Court	2
C. Statement of Case	4
D. Assigned Errors to Be Urged	7
E. Summary of Argument	8
POINT I. The word "Legislature" in Section 4 of Article I means the same representative body referred to in Article II, Section 1, in the Constitution	9
Unless the Provision in Section 4, of Article I that "the Times, Places and Manner of Holding Elections for Senators and Representatives, Shall Be Prescribed in Each State *by the Legislature* Thereof" Was Intended to Limit the State Agency in Respect of These Matters to the "Legislature", It Was Surplusage	21
POINT II. The power conferred on the "Legislature" by the Federal Constitution may not be circumscribed by a State Constitution	23
POINT III. Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support respondents' contention that the word "Legislature" in Section 4 of Article I of the Constitution of the United States, means the "State"	32
POINT IV. The Act of Congress of August 8, 1911, Chapter 5, 37 Stat. L. 13, was limited to the apportionment therein made and expired with the apportionment made pursuant to the Act of June 18th, 1929	37
CONCLUSION. It is respectfully submitted that the order and judgment should be reversed and the case remanded to the State Court with instructions accordingly	45
APPENDIX	46

Cases Cited.

	PAGE
Baldwin v. Trowbridge, 2 Bart. 46	27, 28, 29
Behan v. The People, 17 N. Y. 516, 520	9
Blake v. McClung, 172 U. S. 239	10
Cherokee Nation v. George, 5 Pet. 1, 18-20	9
Clifford v. West Hartford Creamery Co., 153 Atl. 205	9
Courtauld v. Legh, L. R. IV Ex. 126	9
Davidson v. Gilbert (Hind's Prec. Vol. I, p. 180)	30
Davis v. Hildebrandt, 241 U. S. 565	20
Gibbons v. Ogden, 9 Wheat. 1 at p. 194	9, 10
Hawke v. Smith, 253 U. S. 221	15, 19, 20, 23
Hood Rubber Company v. Comm. of Corp., 167 N. E. 670	9
Knowlton v. Moore, 178 U. S. 41	10
Kirkstall Brewery Co., Ltd., In re, 5 Ch. D. 535	9, 10
Lewellyn v. Harbison, 31 Fed. 2nd 740, 742	9
Louisville v. Nashville R. R. v. Kentucky, 161 U. S. 677, 690	34
Lytle v. Arkansas, 63 U. S. (22 Howard) 202	3
Magwire v. Tyler, 1 Black 195; 66 U. S. 195	3
Mangam v. The City of Brooklyn, 98 N. Y. 585, 591-2	9, 10
Myers v. U. S., 272 U. S. 52 at p. 233	10
McPherson v. Blacker, 146 U. S. 1	14, 15, 36
Moeler v. The Bank, 258 N. Y. 373	10
Montana ex rel. Haire v. Rice, 204 U. S. 291	3
People vs. Tremaine, 252 N. Y. 27	33, 35
Perkins v. Morrison—Committee Rep. (Rep. No. 3, 31st Congress, 2nd Session)	30
Pine v. Commonwealth, 121 Va. 812	9
R. vs. Poor Law Commissioners, 6 A. & E. 56	9
Smiley v. Holm, 238 N. W. 494	9, 17, 18, 37
Smiley v. Holm, Opinion of D. J. Loevinger—Cong. R. January 14, 1932	9
Schrader v. Polley (26 S. D. 5)	27, 28
Shiel v. Thayer, 2 Bart. Contested Election Case 349	28
Sapp & Carpenter Cases, 1 Ells. 322—1 Hind's Prec. 672	29, 30
Wendell v. Lavan, 246 New York 115	33, 36

Official Publications, Text Books and Encyclopedias, Etc.

	PAGE
25 Ruling Case Law 995	9
Story's Commentaries on U. S. Constitution	11
2 Lewis Stat. Const., p. 578	9
U. S. Formation of the Union	11, 19, 22, 34
Frothingham History of Mass	19
26 A. & E. Encyclopedia of Law	37
Hind's Precedents, Vol. I	25, 27, 29, 30
Congressional Record, Vol. 47, Part 4, 67th Congress, pp. 3436-7, 3507	31
Congressional Globe, 1st Session, 39th Congress	28, 29
Congressional Globe, 2nd Session, 27th Congress	31
Congressional Record, p. 2445, 71st Congress	44
Journal of Debates, Mass. Const. Conv, 1820	26
Code of Laws	41
U. S. C. A.—Sec. 344 Sub. "B"	2
Cong. Dir. January 1932	43
Tucker's Blackstone Vol I pp 191-192	13
Federalist Vol III p. 2	22

Constitutions and Statutes.

Constitution of the United States.

Article I, Sec. 4	2, 5, 6, 7, 23, 24, 32, 34
Article II, Sec. 1, Cl. 2	15, 23
Article I, Sec. 8, Cl. 17	16, 23
Article I, Sec. 3	16, 21
Article I, Sec. 2, Cl. 1	21, 22
Article I, Sec. 1, Cl. 1	22
Article V	23

Acts of Congress.

Act of August 8, 1911	Appendix 46
Act of June 18, 1929	(Record, pp. 18 to 32) 3, 4, 7

PAGE

1 St. L. 253 37
2 St. L. 128 37
2 St. L. 669 37
3 St. L. 651 37
4 St. L. 516 37
5 St. L. 491 37
9 St. L. 433 ..... 37, 38, 40, 41
12 St. L. 353 38
17 St. L. 28 38
18 St. L. 400 14
22 St. L. 5 39
26 St. L. 735 39
31 St. L. 733 39
37 St. L. 13 ..... 2, 3, 7, 40, 41
44 St. L. 773 42

CONSTITUTION OF NEW YORK.

Article III, Sec. 1 ..... 2, 4, 24
Article III, Sec. 14 24
Article IV, Sec. 9 ..... 4, 24

ACTS OF STATES.

Connecticut
Act of January, 1789 14
Maryland
Ch. XVI of 1790 14
Massachusetts. Resolves 1788-1792 32
Act of Nov. 17, 1788 32
Act of June 7, 1792 32
Acts of New York
Ch. XI of 1789 13
Act of Feb. 27, 1790 33
Election Law § 69 4
Ch. 890 of 1911 ..... 3, 4, 5, 44

PAGE

Minnesota
Laws of 1919 33
Laws of 1919 Special Session 33
New Hampshire
Act of June 17, 1790 13
Concurrent Res. of April 10, 1931 ..... 2, 3, 4, 5
New Jersey
Ch. CCXLI of 1788 13
North Carolina
Ch. XVII of 1792 13
Pennsylvania
Ch. CLVII of 1788 14
Act of 1791 33
South Carolina
Act of Nov. 4, 1788 14
Virginia
Act of Nov. 20, 1788 13

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, Petitioners, against EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervenor-Respondent.	No. 731.

BRIEF ON BEHALF OF PETITIONERS-APPELLANTS.

On certiorari to the Supreme Court of the State of New York to review an order and judgment of the Court of Appeals of the State of New York, being the court of last resort of that state; petition for certiorari granted by this Court March 15th, 1932.

A.

Opinions Delivered in the Courts Below.

The opinion of the Court of Appeals, the Court of last resort of the State of New York, is reported in 258 N. Y. page 292, and appears in the Record, pages 128-134.

The opinions of the Appellate Division of the Supreme Court of the State of New York, Third Department, are

reported in 234 App. Div. 139, and appear in the Record, pages 111-125.

The opinion of the Supreme Court, Albany County Special Term, is reported in 141 Misc. 840 and appears in the Record, pages 92-103.

B.

Jurisdiction of the Court.

The Appellate jurisdiction of this Court is invoked under Section 237 of the Judicial Code of the United States (28 U. S. C. A. Section 344, subdivision b), to correct error of the Court of Appeals of the State of New York, the court of last resort in that State.

The order and judgment of the Court of Appeals is dated February 9, 1932 (R., 134-135).

The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York February 11, 1932 (R., 136-137).

The controversy presented by this cause involves the validity of a Concurrent Resolution adopted by the Legislature of the State of New York (Senate and Assembly, New York State Constitution, Article III, Section 1) (R., pp. 37 to 55), which resolution divided the State of New York into forty-five Congressional Districts. It involves the construction of Section 4 of Article I of the Constitution of the United States and also the question whether the Congressional Act of August 8, 1911 (Chapter 5; 37 Stat. at L. 13) has expired or is still a valid and subsisting law of the United States. The Court below held:

> "The matter being dealt with in Section 4 is the time, place and manner of holding elections for Representatives. Whether these details be fixed by the Legislature of the State or by Congress they are to be fixed by law. If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it in the same way." (R., pp. 132-133).

The Court below further held:

> "Even if this were not so, we would be inclined to hold that the Act of Congress, August 8, 1911 was still in force and effect as a regulation to be followed in providing for the election of an additional number of representatives." (R., p. 133).

and further

> "The two (Act of August 8, 1911 and Act of June 18, 1929) can be read together as a fair and reasonable regulation by Congress for the election of its representatives, and this is the view we should have taken."

The Court below further held:

> "Even if we were to take a different view, however, our conclusion would be that by the Act of 1911 and the similar acts that preceded it, there had been a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be adhered to even if the statute does not govern ex proprio vigore.
>
> With this expression of our opinion, we hold that the resolution of April 10, 1931, is without effect; that forty-three of the forty-five Congressmen are to be elected according to the districts created by chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire State. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the State into forty-five congressional districts."

The case clearly involves a Federal question.

Lytle vs. *Arkansas,* 63 U. S. (22 Howard), page 202;
Maguire vs. *Tyler,* 1 Black 195; 66 U. S. 195;
Montana ex rel Haire vs. *Rice,* 204 U. S. 291.

C.

Statement of the Case.

The Senate an Assembly of the State of New York (The Legislature of that State, New York Constitution, Article III, Sec. 1) adopted on April 10th, 1931 a Concurrent Resolution dividing the State into forty-five Congressional Districts (R., pp. 37 to 55 inclusive). It was not submitted to the Governor of the State for approval under Section 9, Article IV of the Constitution of the State of New York (R., p. 12). Prior to the adoption of this Concurrent Resolution, the State of New York had been divided into forty-three Congress Districts by Chapter 890 of the Laws of 1911 of the State of New York as Amended (R., p. 12). The subdivision of the state into forty-five Congress Districts was made by the Legislature of the State of New York following the apportionment of forty-five Representatives in the House of Representatives to the State of New York by virtue of the Act of Congress approved June 18th, 1929 (R., pp. 18 to 32; 37).

Following the adoption of the resolution by the Legislature of the State of New York, the Attorney General of the State by communication addressed to the respondent Flynn as Secretary of State, dated on or about the 4th of August, 1931, advised the respondent Flynn that the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, was ineffective and advised the respondent as Secretary of State that, in issuing his certificate or certificates pursuant to Section 69 of the Election Law of the State of New York, at least three months prior to the General Election to be held in November, 1932, it would be his official duty to disregard the said Concurrent Resolution of April 10th, 1931, and treat the same as ineffective (R., pp. 13-14).

Section 69 of the Election Law of the State of New York requires the respondent Flynn as Secretary of State, at least

three months before the General Election to be held in November, 1932, to make and transmit to the Boards of Elections of each county of the State and of the City of New York a certificate or certificates, stating, among other things, the number of representatives in Congress who may be lawfully voted for at such election by the voters of the respective counties of the State (R., p. 13).

Following the publication of the opinion of the Attorney General, the petitioners demanded of the respondent Flynn that in issuing the certificates required by the Election Law, he conform to the provisions of the Concurrent Resolution above referred to. The respondent Secretary of State refused to comply with the demand and admitted on the argument that "the respondent intends to be governed by and to follow the opinion of the Attorney General and intends to treat the said Concurrent Resolution, Exhibit D hereto annexed, as ineffective, and further intends to certify to the Board of Elections of each county of the City of New York that representatives in Congress should be elected by the People of the State of New York at the General Election to be held in November, 1932 in the districts prescribed in and by Chap. 890 of the Laws of 1911 as Amended" (R., p. 15).

Alleging that the controversy involved the construction of Sec. 4 of Article I of the Constitution of the United States, and of the Acts of Congress of August 8th, 1911 and June 18th, 1929, and the grave public importance of the questions presented, (R., p. 15) the petitioners prayed the Supreme Court of the State of New York for a mandamus order requiring the respondent Flynn, in issuing his certificate or certificates in the year 1932, pursuant to the Election Law of the State of New York "to certify that 45 representatives in the House of Representatives of the Congress of the United States in the Seventy-third Congress are to be elected in the Congressional districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled 'Concurrent Resolution of the Senate and Assembly constituting the Legislature of the

State of New York, subdividing the State of New York into 45 Congressional Districts and defining the boundaries thereof, and Exhibit 'D' hereto annexed, and that he be directed to perform every other duty devolving on him under the Election Law pertaining to any matter contained in said Concurrent Resolution in accordance with said Concurrent Resolution and not otherwise" (R., pp. 16-17).

Upon motion of James A. Farley, Chairman of the Democratic State Committee, he was permitted to intervene as a respondent (R., p. 6).

The motion for a mandamus order was argued before Mr. Justice Ellis J. Staley, sitting at Special Term of the Supreme Court who denied the motion as matter of law by order dated October 15th, 1931 (R., pp. 5 to 7). On appeal to the Appellate Division of the Supreme Court that court affirmed the order made at Special Term and denied the application for a mandamus order as matter of law, and not in the exercise of discretion (R., p. 110). The order of the Appellate Division was affirmed by the Court of Appeals of the State of New York (R., pp. 134-135). And the order and judgment of the Court of Appeals of the State of New York was made the order and judgment of the Supreme Court, February 11th, 1932 (R., pp. 136-137).

Section 4 of Article I of the Constitution of the United States, the construction of which is involved in this controversy is as follows:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.
>
> The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."

The Act of August 8th, 1911, the construction of which is involved in this controversy is annexed hereto as an Appendix.

The Act of June 18th, 1929 is printed in the Record at pages 18 to 32.

D.

Assigned Errors Intended to Be Urged.

The petitioners-appellants intend to urge the following specification of errors:

(1) The Court of Appeals of the State of New York erred in construing the word "Legislature" in Article I, Section 4 of the Federal Constitution as meaning, with respect to the division of the state into Congressional Districts, the law-making power of the State of New York, including the Governor.

(2) The Court of Appeals of the State of New York erred in holding that the Act of Congress of August 8th, 1911 is an existing and continuing valid act of Congress.

(3) The Court of Appeals of the State of New York erred in holding that the concurrent resolution adopted by the legislature of the State of New York on April 10th, 1931 was invalid and ineffective because it had not received the approval of the Governor of the State of New York.

E.

Summary of Argument.

POINT I. The word "Legislature" in Section 4 of Article I means the same representative body referred to in Article II, Section 1 and elsewhere in the Constitution.

POINT II. The power conferred on the "Legislature" by the federal Constitution may not be circumscribed by a state Constitution.

POINT III. Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support respondents' contention that the word "Legislature" in Section 4 of Article I of the Constitution of the United States, means "The law making power of the State" or the "State".

POINT IV. The Act of Congress of August 8, 1911, Chapter 5, 37 Stat. L. 13, was limited by its title and its terms to the apportionment therein made and expired with the apportionment made pursuant to the Act of June 18th, 1929.

POINT I.

The word "Legislature" in Section 4 of Article I means the same representative body referred to in Article II, Section 1, in the Constitution.

The word "Legislature" must reasonably be held to have the same meaning wherever used in the United States Constitution.

Gibbons v. *Ogden,* 9 Wheat. 1 at p. 194;
Behan vs. *The People,* 17 N. Y. 516, at p. 520;
Mangam vs. *The City of Brooklyn,* 98 N. Y. 585; 591-2;
The Cherokee Nation vs. *George,* 5 Pet. 1, 18-20;
25 Ruling Case Law 995;
2 Lewis Sutherland on Statutory Construction, p. 578;
Hood Rubber Company vs. *Comm. of Corp.,* 167 N. E. 670;
Pine vs. *Commonwealth,* 121 Va. 812;
Clifford v. *West Hartford Creamery Co.,* 153 Atl. 205;
Lewellyn v. *Harbison,* 31 Fed. 2nd 740, 842;
In re Kirkstall Brewery Co., Ltd., 5 Ch. D. 535;
R. vs. *Poor Law Commissioners,* 6 A. & E. 56;
Courtauld vs. *Legh,* L. R. IV Ex. 126;
Smiley vs. *Holm,* 238 N. W. 494.

See also opinion in *Smiley* v. *Holm* of Loevinger, D. J., published in Cong. Record January 14, 1932, pages 2040-45 (not otherwise reported).

We quote from the opinion of Cleasby, B., in *Courtauld* vs. *Legh,* as follows:

> "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament or other document."

Chief Judge Ruger, writing for the Court of Appeals (New York), in *Mangam* vs. *The City of Brooklyn, supra,* at page 592, quotes from *R.* vs. *Poor Law Commissioner, supra,* the following:

> "'We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament on the ground of a supposed general intention in the act, we think it is necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own."

In re Kirkstall Brewing Company, Ltd., supra, the Court said:

> "It is at all events reasonable to presume that the same meaning is intended for the same expression in every part of the act."

Ch. J. Marshall in *Gibbons* vs. *Ogden* (*supra*) page 194, said:

> "If this be the admitted meaning of the word (commerce) in its application to foreign nations it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."

To the same effect is

Moeler v. *The Bank,* 258 New York 373 at p. 378.

It has been held by this Court that the Federal Constitution is "an instrument of exact expression".

Myers vs. *United States,* 272 U. S. 52; p. 233.

Upon this assumption, every word and phrase must be given effect.

Blake vs. *McClung,* 172 U. S. 239;
Knowlton vs. *Moore,* 178 U. S. 41.

Tested by these rules, in the light of conditions existing at the time, and the problems presented, it is clear that the

framers of the Constitution intended the "Legislature" to which they delegated the power in Section 4 of Article I to be the same representative body to which power was delegated by Section 1 of Article II, and elsewhere in the Constitution.

The problem before the Convention was the organization of the National Legislature subsequently called the Congress. Various proposals were submitted resulting finally in a decision that there be two branches and that the members of the second branch (the Senate) should be elected by the Legislatures of each state. The original proposition was that representatives "be elected by the people of the several states".

> *Story Commentaries on the United States Constitution,* 4th Edition, Section 574, pp. 408, 409.

General Pinckney moved that the first branch (the House) instead of being elected by the people, be elected *in such manner as the Legislature* of each state should direct. He urged:

> (1) That this liberty would give more satisfaction, as the legislatures could then accommodate the *mode* to the conveniency and opinions of the people.
>
> (2) That it would avoid the undue influence of large counties which would prevail *if the elections were to be made in districts as must be the mode intended by the report of the committee.*
>
> Madison's notes in the Constitutional Convention, (United States, *Formation of the Union,* House Document No. 398, Sixty-Ninth Congress, First Session), p. 252.

Mr. King suggested that the Legislatures "might even devise the *modes of election* that would be subsersive to the end in view".

General Pinckney's motion to substitute election of the first branch in such *mode* as the Legislature should appoint,

instead of its being elected by the people was voted down, Massachusetts and New York voting in the negative. General Pinckney then moved that the first branch be elected *by the people in such mode as the legislature should direct;* but waived it on its being hinted that such a provision might be more properly tried in the detail of the plan (*ibid.*, p. 254).

On Monday, August 6th the Committee of Detail made its report. Article IV, Section I read as follows:

> "The members of the House of Representatives shall be chosen every second year, by the people of the several states comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several states, of the most numerous branch of their own legislatures."

The report also proposed Article VI, Section 1 as follows:

> "The times, places and manner of holding elections of the members of each house shall be prescribed by the legislature of each state; but other provisions concerning them may, at any time be altered by the Legislature of the United States."

Messrs. Pinckney and Rutlidge moved to strike out "but other provisions concerning them may, at any time be altered by the Legislature of the United States". Mr. Madison argued the question at length. He objected to giving the legislatures "the *uncontrolled* right of regulating the times, places and manner of holding elections". Further changes were agreed on following which Article VI, Section 1 "as thus amended was agreed to *nem con*" (Ibid, pp. 510, 511).

On September 7th, 1787 the entire matter was referred to a Committee of five to revise. This Committee was known as Committee on Style. That Committee reported on September 12th a digest of the plan of which printed copies were ordered to be furnished to the members (Formation of the Union, p. 702). This plan proposed the following language for Section 4 of Article I:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations" (Ibid, p. 704).

The words "except as to the places of chosing senators" were added to the end of the 1st clause of Article I, Section 4 "in order to exempt the seats of government in the states from the power of Congress" (Ibid, p. 721).

We find no record of further discussion in respect of the precise language used in Section 4 of Article I except the statement of Mr. Garey at page 738 that he objected to "the power of Congress over the *places* of election".

The framers of the Constitution obviously believed it essential that the elections should be at such a *time* that the people would find it convenient to vote; that they should be at such a *place* as the people might find it convenient to reach; and that the representatives should be elected either at large or in districts, whichever *mode or manner* the legislature representing the people of the state might prefer. X

Following the adoption of the Constitution, New York by Chapter XI of 1789 passed January 27th of that year, divided the State into six Congressional Districts, and directed the first election to be held the first Tuesday in March and thereafter in April every second year.

In New Jersey, on the other hand, the legislature provided for the election of representatives at large by Chapter CCXLI November 21, 1788.

In North Carolina, the legislature by Chapter XVII of 1792, divided the state into ten Congressional Districts.

In Virginia, the legislature by an Act of November 20, 1788, directed the election of one representative in Congress from each of ten Congressional Districts, and ordered the voters to assemble at the County Court House on February 2nd.

On June 17, 1790 the New Hampshire Legislature passed "An Act Directing the Mode of Choosing Representatives in

X Tucker's "Blackstone" 1803 Vol. I, pp. 191-1

Congress". We are unable to state the substance of the Act because no laws were published for the Session of 1790 and 1791.

In Pennsylvania the legislature by an Act of August 4, 1788, Chapter CLVII directed the time, places and manner of holding elections for representatives and for appointing electors. The time for electing representatives was fixed as the last Wednesday of November. The time for electing electors was fixed as the first Wednesday of January. The Act provided for the election of ten representatives at large and ten electors at large.

In South Carolina the legislature by the Act of November 4, 1788 provided for five districts, each to have one representative, the election to be held at the "time and places" for the election of state representatives.

In Maryland, Chapter XVI of the Laws of 1790, established six districts for the election of representatives and electors and fixed the first Monday of October in every second year for the election.

In Connecticut the legislature, on the first Thursday of January, 1789, passed "An Act for Regulating the Election of Senators and Representatives for this State in the Congress of the United States", providing for five representatives at large.

This Court in *McPherson* vs. *Blacker,* 146 U. S. 1, has pointed out the various ways in which the presidential electors were provided for in the various states.

And as late as 1842 when Congress passed an act requiring the election of representatives in Congress in districts, four states (New Hampshire, Missouri, Mississippi and Georgia) defied the law and continued to elect their representatives in Congress at large.

To avoid this confusion, Congress directed that all representatives be elected on the Tuesday after the first Monday in November, in every even numbered year (R. S. 25; March 3, 1875, c. 130, § 6, 18 Stat. 400) and beginning in 1842 has, in a series of apportionment acts directed the election of representatives by districts.

When the Constitution was under discussion and adopted in its present form, the delegates to the Convention knew that in the State of Massachusetts the Governor had a veto power over all legislative activity and that in New York a Council of Revision had a veto power. They knew that in the remaining eleven states the legislature, (a bicameral body in every state except Pennsylvania), was supreme.

> "The only question really for determination is: What did the framers of the Constitution mean by requiring ratification by 'legislatures'. That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people."
>
> *Hawke* vs. *Smith,* 253 U. S. 221 at p. 227.

It must be assumed that if the framers of the Constitution intended to delegate the power to say whether representatives in Congress should be elected at large or by districts to the "state", they would have said so.

A somewhat similar situation arose in connection with the election of electors. In respect of that subject matter the framers of the Constitution provided that "each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress" (Article II, Section 1, Cl. 2). This Court held in *McPherson* v. *Blacker* (146 U. S. 1) that under this provision the members of the bicameral body had the power themselves to appoint electors, and the insertion of the words "in such manner as the legislatures thereof may direct" operated as a limitation upon the State in respect of any attempt to circumscribe the legislative power.

In that case the question was whether the Legislature of the State of Michigan could direct that presidential electors be elected from districts coterminous with Congressional districts or whether they must be appointed at large. On the

one hand, it was claimed that since the appointment was made by the State, it was required to act as a political entity on each elector and the provision for election from districts was in violation of Article II, sec. 1, Cl. 2. In opposition thereto it was claimed that since the appointment was to be made as the Legislature directed, its discretion was unlimited. This Court in the course of its opinion said (p. 25):

> "The clause under consideration does not say that the people or the citizens shall appoint, but that 'each state shall'; and if the words, 'in such manner as the Legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the State Constitution in that regard. *Hence, the insertion of these words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power cannot be held to operate as a limitation on that power itself*" (Italics ours).

That care was used in the selection of terms is evident from the language of Article 1, Section 8, Cl. 17. In that clause the framers of the Constitution provided that Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, *by cession of particular states*, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the *consent of the Legislature of the State* in which the same shall be for the erection of forts, etc." Here the framers of the Constitution clearly had in mind the difference between property owned by the state and private property. As to property owned by the state, the Constitution requires *state* action. As to private property it requires the *consent of the Legislature.*

Section 3 of Article I confers upon the "Legislature" the power to choose Senators of the United States. Section 4 confers upon the "Legislature" the power to prescribe the times, places and manner of electing Senators. *In the same*

sentence the "Legislature" is given power to prescribe the times, places and manner of electing Representatives in Congress. The word "Legislature" could not have been used by the framers of the Constitution in two different senses in the same sentence. The "Legislature" referred to in Section 3, Article I is the same "Legislature" which is referred to in Section 4 of Article I. It is inconceivable that the framers of the Constitution intended to exclude the executive when they authorized the "Legislature" to choose Senators, and at the same time to include him when they gave that same body power to determine the times, places and manner of their election. Unless it can be said that the Constitution gave the executive a voice in fixing the time, place and manner for electing United States *Senators,* it cannot possibly be said that the Constitution gave the executive any voice in fixing the time, place and manner of electing *Representatives* in Congress.

The framers of the Constitution made use of the Congress, the Legislature, the Executive, the State, and did not fail to refer to "appropriate legislation by the State." Quoting from the opinion of D. J. Loevinger in *Smiley* v. *Holm* (*supra*):

> "Thus as the appropriate agency designated by the Federal Constitution the Legislature shall 'choose' Federal Senators, 'fill' Senatorial vacancies, 'prescribe' the time, place and manner of holding elections for Senators and Representatives, and 'direct' how the State shall appoint Presidential electors. In the same capacity the Legislature may 'apply' to the United States for protection against domestic violence, 'apply' to Congress to call a Constitutional Convention, 'ratify' an amendment to the Federal Constitution, 'consent' to the purchase of land from the State by the United States, 'consent' to the formation of a new state out of portions of its own territory.
>
> But if a criminal escape from one State to another, the State harboring him must deliver him upon the demand of the Executive of the State from which he fled (Article IV, Section 2, Cl. 3); if a vacancy occurs in representa-

tion from any State, the Executive authority shall call an election to fill it (Article I, Section 2, Cl. 4); if a vacancy occurs in the Senate, the Executive may make temporary appointments (Article I, Section 3, Cl. 2); if the Legislature cannot be convened, the Executive may ask for protection against domestic violence (Article IV, Section).

And by contrast, when a State cedes territory to the United States (Article I, Section 8, Cl. 17) or when it consents to surrender its equal representation in the Senate (Article V), it acts in its corporate or full legislative capacity. So must the original States have acted prior to 1808 when they admitted the importation of such persons as they 'thought proper'. Article I, Section 9. Each State reserves to itself authority to train and to appoint the officers of the State Militia (Article I, Section 8, Cl. 16). Amendment XVIII may be enforced by the State 'by appropriate legislation'. A State may ratify an amendment to the Constitution by a convention (Article V) as well as by the Legislature, although neither the State nor its Executive, nor a Convention, but only 'the Legislature' may request that amendments be proposed. On the other hand, the restrictions or prohibitions put upon a State are never directed to its Legislature or its Executive but upon the State in its entire corporate capacity."

We respectfully direct attention to the entire opinion disclosing careful research and thought of Mr. Justice Loevinger, District Judge of Minnesota, in *Smiley* v. *Holm*, published in the Congresional Record on January 14, 1932, pages 2040-45.

The delegates to the Convention which adopted the Constitution would not have voted in favor of a proposition giving the Executive of each and every state a veto over Federal legislation. The proposal to given even the President a veto power was strenuously combated before final adoption.

Benjamin Franklin expressed himself vigorously against the grant of any veto power to the President. He said:

"He had had some experience of this check in the Executive on the Legislature, under the proprietary Gov-

ernment of Pennsylvania. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him."

(Madison's Notes—United States—Formation of the Union, p. 148.)

"Mr. Sherman was against enabling any one man to stop the will of the whole. No one man could be found so far above all the rest in wisdom. He thought we ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature" (Ibid, pp. 148, 149).

Colonel Mason supported the view of Dr. Franklin (*Ibid* p. 150).

Mr. Bedford argued:

"That no check was necessary on a Legislature * * * with two branches" (Ibid, p. 94).

Mr. Frothingham in "A Brief History of the Constitution and Government of Massachusetts" (1915), at page 16 makes the following observation:

"It is curious to note the decline of the Colonial Governor's power and the usurpation of his authority with the Assembly * * * Under the original Constitution of the States the powers of the Assembly were made paramount and numerous checks placed upon the authority of the Governor."

Counsel for appellee in *Hawke* vs. *Smith, supra,* contended that:

"The term 'legislature' in Article I, Section 4 of the United States Constitution comprehends the entire legislative power of the State; and as so used, includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1(a) of Article II of the Ohio Constitution."

See argument of counsel 253 United States, page 224.

This Court, per Mr. Justice Day, rejected the argument in the following statement (p. 227):

> "A legislature was then the representative body which made the laws of the people."

In *Hawke* v. *Smith, supra,* this Court held that the word "Legislature" in Article V of the Federal Constitution dealing with amendments to the Constitution, refers to the bicameral body; that an amendment to the Constitution of the United States ratified by the Legislature was valid and effective without submission to or approval by the Governor of the State and without submission to or approval by the people of the State by a referendum vote pursuant to the Constitution of the State of Ohio.

In *Davis* v. *Hildebrandt,* 241 U. S. 565, this Court held that the Congressional Act of August 8, 1911 required the states to be re-districted according to state laws rather than —as had, in previous apportionment acts been provided—by the State legislatures; that the Act of August 8, 1911 was a valid and enforcible Act of Congress pursuant to the provisions of Section 4, Article I of the Federal Constitution, and that therefore the attempted re-districting of the State of Ohio was ineffectual.

But the same fundamental question seems to have been inherent in that as in the instant case, viz.: in the absence of authorization by Congress, acting under the power conferred by Article I, Section 4, may the discretion of a legislature in prescribing the times, places and manner of holding elections for representatives in Congress be circumscribed by those provisions of a state constitution which regulates enactment of the laws for state governmental purposes. Congress had construed the term "legislature" as not meaning state law and had therefore substituted for the word "legislature", the words by "laws of the state". This court said (p. 568):

> "We think it is clear that Congress in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, ex-

> pressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that whereby the state constitution and laws, the referendum was treated as part of the legislative power, the power thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since under the act of Congress dealing with apportionment, which preceded the Act of 1911, by Sec. 4 it was commanded that the existing districts in a state should continue in force until the legislature of such state, in the manner herein prescribed, shall redistrict such state (Act of Feb. 7, 1891, chapter 116, 26 Stat. at L. 735); while in the act of 1911 there was substituted a provision that the redistricting should be made by a state 'in the manner provided by the laws thereof',"

and again (p. 569):

> "In so far as the proposition challenges the power of Congress, as manifested by the clause in the Act of 1911, treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state constitution and laws, the argument but asserts on the one hand, that Congress had no power to do that which, from the point of view of Sec. 4 of Article I, previously considered, the Constitution expressly gave the right to do."

Unless the Provision in Section 4, of Article I that "the Times, Places and Manner of Holding Elections for Senators and Representatives, Shall Be Prescribed in Each State *by the Legislature* Thereof" Was Intended to Limit the State Agency in Respect of These Matters to the "Legislature", It Was Surplusage.

Section 2 of Article I provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several states".

Section 3 of Article I provides that "the Senate of the United States shall be composed of two Senators from each state, chosen *by the legislature* thereof".

In these two short sentences complete provision is made for the election of senators and representatives. The senators are to be elected by the "legislatures" of the states, the representatives by the "people" of the states. With nothing added, the states would have been free to regulate the election of senators and representatives as they saw fit by constitutional provision, or otherwise.X The framers of the Constitution were unwilling to grant this broad power to the states. It was provided that the electors for representatives in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature (Art. I, Sec. 2, Cl. 1); that a representative must be twenty-five years of age and have been a citizen for seven years and an inhabitant of the state from which chosen when elected (Art. I, Sec. 1, Cl. 1).

It was provided that a senator must be thirty years of age when elected and have been nine years a citizen of the United States, and an inhabitant of the state from which he shall be chosen at the time of his election.

It is obvious that the delegates to the Convention which framed the Constitution were unwilling to leave the regulation as to the time, place and manner of electing senators and representatives to the states as such. They were insistent that these regulations be made by the "Legislature", as distinguished from any other state power.

Messrs. Madison and Gouveneur Morris felt that the right of the legislatures to regulate the election of senators was involved in the "right of appointing them", and therefore moved to strike out "each house" and to insert "the House of Representatives" (United States—Formation of the Union, p. 509). The proposition "was disagreed to" (*Ibid*).

It is clear from what occurred that the framers of the Constitution were unwilling to assume anything in respect of this important matter. They were unwilling to assume that the legislatures would have the power intended, without any express provision to that effect. If the framers of the Constitution had intended that the state rather than the legis-

X. Federalist Vol II p. 82

lature, should have the power conferred upon the Legislature by Section 4 of Article I of the Constitution, but that Congress should always have the right by law to control the election of senators and representatives, except as to the places of choosing senators, the first phrase of Clause 1 is entirely unnecessary. The natural and simple and precise provision would have read:

> "Congress may at any time by law make or alter any regulations of any state in respect of the election of senators and representatives, except as to the places of choosing senators."

The framers of the Constitution did not use language unnecessarily. By seven words—"To establish post offices and post roads", they conferred a multitude of power on the Congress. In all of the seventeen subdivisions of Section 8, Article I, conferring jurisdiction on Congress, not one unnecessary word is used. It is impossible to believe that the framers of the Constitution inserted the first phrase of the 1st clause of Section 4 of Article I unnecessarily. Nor is it conceivable that in the light of the accuracy with which words and phrases were used by the framers of the Constitution that the word "Legislature" should have been used in Section 4 of Article I if the framers of the Constitution meant the "state" or anything other than the bi-cameral body referred to in Article V, and described by this court in *Hawke* v. *Smith* (*supra*).

POINT II.

The power conferred on the "Legislature" by the Federal Constitution may not be circumscribed by a State Constitution.

Article III, Section 1, of the New York State Constitution reads as follows:

> "The legislative power of this state shall be vested in the Senate and Assembly."

Section 14, Article III of the New York State Constitution provides that no law shall be enacted except by bill.

Section 9, Article IV, provides that every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve he shall sign it; but if not, he shall return it with his objections to the house, in which it shall have originated. The Legislature may, by a two-thirds vote of the members elected, pass the bill as a law over the objections of the Governor.

It is contended by respondents that the resolution in question is invalid because the Legislature failed to act pursuant to the provisions of the New York State Constitution. If the Constitution of a state may *restrict* legislative action authorized by the Federal Constitution, it may, in effect, take the power from the Legislature and put it into a Constitutional Convention, the members of which may never become members of the Legislature. If the Constitution of a state may provide that to re-district a state into Congressional Districts, pursuant to Section 4, Article I of the Federal Constitution, the legislature must do so by a bill approved by the Governor or passed over his veto by a two-thirds vote, it may require a four-fifths vote, or a unanimous vote, or may provide that no apportionment shall be valid unless approved by the Governor. Some of the best minds of the country in the legislative halls and Constitutional Conventions have spoken against any such power in the state.

In the election case of the West Virginia members in the Forty-third Congress, a question arose as to the power of a State Constitutional Convention to fix the time for election of Representatives in Congress. The Majority Report held as follows:

> "What shadow of authority, therefore, was there in the convention to interfere? The State Constitution had not given to the legislature the power to say when Congressmen shall be elected (for it did not have it to give), and neither State Constitution nor State Convention could take it away. The legislature derived it from the supreme law of the land, the constitution of the United States, and in its exercise it knew but one master."
>
> Hind's Precedents, Vol. I, page 653.

> "In the case of Baldwin v. Trowbridge, in the Thirty-Ninth Congress, this House held that 'where there is a conflict of authority between the Constitution and the legislature of a State in regard to fixing the place of elections, the power of the legislature is paramount."
>
> Hind's Precedents, Vol. I, page 654.

In the Massachusetts Convention of 1820 to revise the State Constitution a resolution was submitted to limit the discretion of the legislature in prescribing "the times, places and manner" of the election of representatives in Congress. Mr. Austin proposed an amendment to the State Constitution for the election of representatives in such districts "as the legislature shall direct". The resolution was defeated.

In the debate, Justice Story, a member of the convention, opposed the resolution and declared that:

> "the fourth section of the first article of the constitution of the United States declares, 'that the times, places and manner of holding election for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators'. Here an express provision was made for the manner of choosing representatives by the state legislatures. They have an unlimited discretion in the

subject. They may provide for an election in single districts, in districts sending more than one, or by a general ticket for the whole state. Here is a general discretion, a power of choice. What is the proposition on the table? It is to limit this discretion, to leave no choice to the Legislature, to compel representatives to be chosen in districts. In other words, to compel them to be chosen in a specific manner—excluding all others. Was not this plainly a violation of the constitution? Does it not effect to control the Legislature in the exercise of its legitimate powers? Does it not interfere with the superintending authority of Congress? * * * Again, the second article and first Section of the Constitution of the United States provides, that 'each state shall appoint, in such manner as the *legislature* thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress'. Here a discretion as to the choice of electors is given to the Legislature. It is unlimited, yet the proposition before us goes directly to destroy this freedom of choice, and compels the Legislature to resign all manner of choice but one. It assumes a control over the legislature which the constitution of the United States does not justify. It is bound to exercise its authority according to its own views of public policy and principle, and yet this proposition compels it to surrender all discretion. In my humble judgment, said Mr. S., and I speak with great deference for the Convention, it is a direct and palpable infringement of the constitutional provisions to which I have referred."

See In Congressional Library,

"Journal of Debates and Proceedings in the Convention of Delegates chosen to revise the Constitution of Massachusetts, begun and holden at Boston, November 15, 1820, and continued by adjournment to January 9, 1821." Reported for the Boston Daily Advertiser New Edition Revised and Corrected. Boston published at the office of the Daily Advertiser 1853.

Mr. Webster, following Justice Story, declared that:

"Whatsoever was enjoined on the legislature by the Constitution of the United States, the legislature was

bound to perform; and he thought it would not be well by a provision of this Constitution to regulate the mode in which the legislature should exercise a power conferred on it by another Constitution."

Hind's Precedents, Vol. I, page 653.

The election case of *Baldwin* v. *Trowbridge,* 2 Bart 46, decided by Congress, in the First Session of the 38th Congress, when the Majority Report (Report No. 13) was sustained by a vote of the House of 108 to 30, is directly in point. In *Schrader* v. *Polley* (26 S. D. 5), the court, with no judicial precedent as a guide, quotes extensively from and adopts the minority report, with not the slightest reference to the majority report nor to the determination of Congress thereon.

The case arose in Michigan. The State Constitution prohibited an elector from voting outside of the township or ward in which he resides and the question arose as to soldiers' votes thus prohibited by the Constitution.

The following quotation is from the Majority Report adopted with such great unanimity by the House:

"Here is an unmistakable conflict of authority. The constitution plainly prohibits what the legislature as plainly permits. The one authorizes the election to be held only in the township or ward—the other at military headquarters. The power to act at all in the premises, so far as concerns representatives in Congress, is derived from article one, section four, of the Constitution of the United States, which is as follows:

* * * * * * * *

"Here the power is conferred upon the legislature. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature eo nomine, as known in the political history of the country? The committee have adopted the latter construction. At the time the Constitution of the United States was written, there existed in the thirteen States for which it was designed legislatures, created or restrained by some fundamental

> law, in the shape of charters or constitutions, very much as they exist in the several States now. With this fact before them, it is not probable that the framers of the Constitution, if they intended to confer this power upon State organic conventions, would have chosen some word less liable to misconstruction. It is also apparent, from the manner in which this word is used in other parts of the instrument, that its framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law."

The opinion of the court in *Schrader* v. *Polley* also cites *Shiel* v. *Thayer,* 2 Bart Contested Election Case 349, and misinterprets what was decided in this case. Mr. Dawes wrote the report in *Shiel* v. *Thayer* which did contain in its concluding sentences what Mr. Dawes admitted in the debate in *Baldwin* v. *Trowbridge* to be mere dictum representing only his personal views. The report in *Baldwin* v. *Trowbridge,* above quoted, was not in conflict with the decision in *Shiel* v. *Thayer.* In said debate (Congressional Globe, 1st Session—39th Congress, pp. 815-823) Mr. Marshall who wrote the Minority Report claimed that the Baldwin Report was in conflict. Mr. Dawes denied this, asked Mr. Marshall to yield, and said:

> "The State of Oregon had omitted entirely through its legislation eo nomine to prescribe any other time for the election of a member of Congress than that which had been prescribed in the Constitutional Convention at the origin of the State, which was itself a legislative body in very many respects, so that there is no conflict between the position here assumed by the committee and the position assumed by the committee in that case, though there may be a conflict in the language used in the report, for I admit that the language of the report of the committee goes to the full extent claimed by the gentleman from Illinois (Mr. Marshall) at this time" * * *

Mr. Scofield who wrote the Majority Report in *Baldwin* v. *Trowbridge,* interrupted to ask:

"Taking the Oregon case, for instance, is there in his judgment anything in the conclusions to which the committee came in that case that is at all in conflict with the logic used by the majority *of the Committee* of Elections in this case?"

And Mr. Dawes answered there was not.

In support of the Majority Report in *Baldwin* v. *Trowbridge,* Representative Fernando C. Beaman of Michigan delivered the principal speech, a scholarly and convincing exposition of the principles involved, to which special attention is respectfully directed (Cong. Globe, 1st Session, 39th Congress, p. 815). One brief quotation here follows:

"A Representative in Congress, then, is not a State officer. He is not a creature of the State, but of the National Government. The Legislature, in providing the times, places and manner of elections of Representatives, does not derive its authority from the people of the State through their Constitution, but from the Constitution of the United States. This delegation of power is not in terms conveyed through the people of the State, nor the Constitution of the State, but it is conferred directly upon the Legislature. The power is not simply permissive, but mandatory; and it is of the most plenary character, subject only to the control of Congress. * * * If the act is repugnant to the Constitution of the State as it respects the places of election of State Officers * * * then to that extent it is undoubtedly void. If it is framed in pursuance of and in accordance with the Constitution of the United States in regard to the election of Representatives in Congress, then to that extent it is just as clearly valid."

In *Sapp* and *Carpenter* cases, (House Report No. 19, 30th Session 46th Congress, 1 Hinds Precedents, p. 672, 1 Ellsworth, p. 322) it was further said:

"We disregard altogether the provision for the election of members of Congress found in Sec. 7, Art. 12 of the Constitution of Iowa. That provision may tend to show that it was the intention of the people of Iowa

that members of Congress should be elected on the second Tuesday in October of the even numbered years not Presidential, but the time of electing members of Congress cannot be prescribed by the Constitution of a State, as against an act of the legislature of a State or an act of Congress."

The *Sapp* and *Carpenter* cases, like the Oregon case, related to State constitutional provisions adopted with the admission of new States in the Union. But such constitutional provisions resulted from enabling acts of Congress, as necessary as they were exceptional as there could be no legislature until the state was admitted, and were only of a temporary nature. The Sapp and Carpenter Majority Report further states:

"The only apparent exception has been in the constitutions which have been formed by territories, and with which such territories have been admitted into the Union as States; but this, if it be a valid exception, does not prove that territories have the right by a constitution to fix the time for electing Representatives in Congress when they become States; but the authority of these provisions rests on the sanction and adoption of them by Congress in admitting such territories as states with constitutions containing such provisions."

In Kentucky election case of *Davidson* v. *Gilbert* in the 56th Congress, it was held (Hind's Precedents, Vol. 1, p. 180):

"The claims of the contestant that the act was contrary to the State constitution, and that it had never properly passed the legislature, are dismissed by the committee without discussion as having no foundation."

In *Perkins* v. *Morrison*, the Commitee Report (Report No. 8, 31st Congress, 2nd Session) held as follows:

"By the constitution of the United States, the right to prescribe the times, places, and manner of holding elections for representatives in each State is declared to be in the legislature thereof, subject to the superior power

of Congress to make or alter such regulations by law. That power, however, Congress has never exercised, until it was partially exerted by the second section of the act of June 25, 1842, to which reference has already been made. *Limited only, therefore, by the provisions of that section* (italics ours), the legislature of New Hampshire had plenary power to prescribe by what districts the elections should be made, and to change the boundaries of those districts at its pleasure, and at any time. *No constitutional provision, now law of Congress, restrains this right originally to form, or subsequently to alter the limits of congressional districts, at the discretion of the State legislature.*" (Italics ours.)

The "Burton amendment" to the apportionment act of August 8, 1911 substituting the expression "provided by the laws thereof", for the expression "by the legislature thereof" offered to cover the Ohio referendum law, was adopted upon the argument of Senator Burton who directed attention to the obvious meaning of the term "legislature". The debate (Congressional Record, Vol. 47, Part 4, 67th Congress—pp. 3436-7 and p. 3507) indicates that Senator Burton's attention had not been called to the identical use of the term legislature in the Constitution. A previous bill from the House had read "by the laws of the State", and he had noted that the new bill substituted the phrase "by the legislature thereof." But he had no doubt of the meaning of "legislature". And Congress by its act upheld his contention.

This was not the first attempt in Congress to recognize the laws of the States in the creation of congressional districts. When, in 1842, the bill to require representatives to be elected by districts was before the 27th Congress, the judiciary committee of the Senate reported an amendment as follows:

> "and the election in such State shall, under the laws thereof, be made by districts, such districts shall be composed of contiguous territory," etc.

This amendment was defeated by a vote of 40 to 4 (Congressional Globe, 2d Session 27th Congress, p. 536).

POINT III.

Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support respondents' contention that the word "Legislature" in Section 4 of Article I of the Constitution of the United States, means the "State".

Respondents contended in the court below that the uniform practice of "one hundred and forty years" has established the meaning of the word "Legislature" as used in Section 4 of Article I as synonymous with "State" or "law making power of the State". At the outset it should be noted that there has been no uniform practice for a period of one hundred and forty years. In 1788 the Governor of Massachusetts was the only executive having a veto power. In New York a Council of Revision had a veto power. It was not until after the adoption of the Constitution that the veto power in executives was—and slowly—adopted by other states. Georgia conferred a veto power on its Governor in 1789; Pennsylvania followed in 1790; Connecticut in 1818; New Jersey in 1844; South Carolina in 1865; Virginia in 1870; Maryland in 1876; Delaware in 1897; Rhode Island in 1909. North Carolina has never given its executive a veto power.

Massachusetts in 1788 (November 17, 1788), and again in 1792 (June 7, 1792), divided the state into Congressional districts by resolution. True it is that these resolutions appear to have been submitted to John Hancock then the Governor of Massachusetts, pursuant to the provisions of the constitution of that State.

See

Mass. Resolves 1788 p. 53;
Mass. Resolves June 1792 p. 25.

At that time the practice was to treat legislative matters by "enactments". The first ten amendments to the Constitution of the United States were ratified by the State of New York by "An Act" approved by the Council of Revision February 27th, 1790. Massachusetts did not ratify the first ten amendments to the Constitution, but ratified the Eleventh Amendment by an act of June 26th, 1794, approved by the Governor. Pennsylvania ratified the Eleventh Amendment in 1791 by an act approved by Governor Mifflin of that state.

Massachusetts, by an act of June 28th, 1798 provided for the cession of Castle Island and granting "The consent of this state for the purchase by the United States of Governors Island from private parties, both being in the Harbor of Boston". Massachusetts correctly provided *by a State law* for the cession of Castle Island because it was apparently state property; but unnecessarily used a state enactment for granting its consent to the sale of private property under Article I, Section 8, Subdivision 17. As we have pointed out above, where the state ceded its property a state law was necessary. Where the United States sought to buy private property within the boundaries of the state, the *consent* of the "Legislature" was required.

But this form of procedure was entirely without significance because there was no necessity for acting otherwise. As late as the year 1919 the State of Minnesota ratified the Eighteenth and Nineteenth Amendments by an act approved by the Governor. (Minnesota Sessions Laws 1919, p. 765; also Minnesota Special Session Laws of 1919, p. 105).

Where the Court has reached the conclusion that a practice relied on has been wrong, it has not hesitated to reject the practice as being in violation of the statute or constitutional provision under consideration.

Matter of Wendell vs. *Lavan*, 246 N. Y. 115;
People vs. *Tremaine*, 252 N. Y. 27.

What the framers of the Constitution intended by the word "Legislature" as used in Section 4 of Article I, cannot

be changed by a practice adopted by the states thereafter; for obviously, that practice may have been in direct conflict with what the framers of the Constitution intended. The attitude of the states in respect of this particular section caused considerable difficulty and discussion. Many of the states in ratifying the Constitution insisted upon an amendment of Section 4 of Article I, which would strike out the power reserved in Congress to overrule legislative regulations in respect of the election of representativs in Congress.

See

United States—Formation of the Union, pp. 1018, 1019, 1023, 1025, 1033, 1038, 1050, 1055, 1056.

The New York State Convention enjoined upon their representatives in Congress to exert all their influence and use all reasonable means to obtain a ratification of amendments to the Constitution including one, that the Congress shall not make or alter any regulation in any state respecting the times, places and manner of holding elections for Senators or Representatives unless the Legislature of such State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstances be incapable of making the same, and then, only until the Legislature of such state shall make provision in the premises; provided that Congress may prescribe the time for the election of representatives (*ibid*, pp. 1039 and 1040).

But the Congress has consistently refused to propose any such amendment to the Constitution, and the Constitution never has been amended in respect of Section 4 of Article I. It reads today just as it read when it was adopted in 1787.

In *Louisville & Nashville R. R.* v. *Kentucky*, 161 U. S. 677, 690, this Court said:

> "While the doctrine of contemporaneous construction is doubtles of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet, to justify its application to a particular case, such contemporaneous construction must be shown to have

been as broad as the exigencies of the case require. * * * As is said by Mr. Justice Cooley, in his Constitution Limitations (6th Ed.), page 85: "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designated to guard against appearing, or *without anyone being sufficiently interested in the subject to raise the question;* but these circumstances cannot be allowed to sanction a clear infraction of the Constitution'."

The language used by Mr. Justice Cooley, quoted by this Court, might well have been written with respect to the question now before it. The Constitution of the United States provides that the Legislatures shall execute a certain function. It detracted nothing from their acts that the Legislatures performed their duty in a particular form. When the Legislatures made provision for the election of representatives in Congress all interest ceased. Neither the Congress of the United States nor the people were concerned with the precise way in which the Legislature acted.

Judge Pound, writing for the Court of Appeals (New York) in *People* vs. *Tremaine* (252 N. Y. 27), at page 47, in language almost prophetic of the present controversy, states the rule in the following language:

"Now comes a serious conflict between the executive and administrative officers and the Legislature by reason of appointments amounting to a substantial encroachment by the latter upon the powers of the former. General acquiescence in a custom which, all things considered, may not have resulted in a harmful violation—or indeed, any violation—of the Constitution, does not preclude a contest when substantial rights are insisted upon (Los Angeles v. Los Angeles City Water Co., 177 U. S. 557, 579). In times of peace and harmony constitution rights are not asserted. When a crisis presents itself the Constitution is invoked and when a justifiable question is presented to the courts they must decide it."

Neither practice nor intentions can modify the express provisions of the Constitution.

Wendell v. *Lavan*, 246 N. Y. 116, page 120.

After submitting redistricting acts to executives in States where executives had power of veto for many years, the legislatures of three states (New York, Minnesota and Missouri) unable to agree with the executives of those States, have asserted the right to act independently of the executive.

If, as we contend, they always had this right, they necessarily have the right and the power now to assert it.

A similar question was presented to this court in *McPherson* vs. *Blacker, supra.* In that connection this Court (at p. 35) called attention to a report made by Senator Morton, Chairman of the Senate Committee on Privileges and Elections, on the 28th of May, 1874, and quoted from that report, apparently with approval, the following:

> "'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect Senators of the United States. *Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.*' Senate Rep. 1st Sess. 43d Cong. No. 395." (Italics ours.)

POINT IV.

The Act of Congress of August 8, 1911, Chapter 5, 37 Stat. L. 13, was limited to the apportionment therein made and expired with the apportionment made pursuant to the Act of June 18th, 1929.

A temporary statute is one limited in duration at the time of its enactment, either expressly or by force of its character.

> 26 A. & E. Enc. of Law, page 534, citing 1 Bouv. inst. 112;
> *People ex rel. Smiley* v. *Holm,* 238 N. W. 494.

The apportionment Act of August 11, 1911, was clearly intended to be and actually was limited to the apportionment therein made, as was every apportionment act prior thereto with the exception of the Act of Congress effective May 23rd, 1850, providing for the Seventh Decennial Census and the apportionment of Representatives in Congress thereunder and similarly for subsequent apportionment to follow each decennial census (9 Stat. L. 433).

In accordance with the provisions of the Federal Constitution, the census of the population of the United States was had in 1790, following which Congress passed its first apportionment act, effective April 14, 1792 (1 Stat. L. 253). This was a very brief act, consisting of but one short paragraph, conforming to the requirements of the Constitution.

Following the censuses of 1800, 1810, 1820 and 1830, Congress passed apportionment acts (2 St. L. 128, 2 St. L. 669, 3 St. L. 651, 4 Stat. L. 516), all substantially the same as each of the preceding acts except as to the number of Representatives.

Following the census of 1840 Congress passed its sixth apportionment act (5 Stat. L. 491). It decreased the number of Representatives. It consisted of two paragraphs, the first

being substantially the same as the preceding apportionment acts except the basis of representation. Section 2 of the Acts of 1842 provided

> "That in every case where a state is entitled to more than one Representative in Congress the number shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which such state may be entitled, no one district to be entitled to more than one representative."

By the Act of Congress effective May 23, 1850 (9 Stat. L. 433), provision was made for taking the seventh decennial census. The Act was similar in form to Exhibit A attached to the petition, being the Act of June 18, 1929. It was the first time and the only time other than by the Act of June 18, 1929, that Congress provided for taking the census and determining the representation in Congress in the same Act. This was the seventh apportionment act. This act contained no regulation such as was contained in the Act of 1842 with respect to the election of Representatives in Congress by districts composed of contiguous territory.

Following the census of 1860 Congress enacted its eighth apportionment act, increasing the number of Representatives (12 Stat. L. 353). It contained no provision for subdividing the states into Congressional Districts.

Following the census of 1870 Congress enacted its ninth apportionment act (17 Stat. L. 28). By that act the number of Representatives was increased. The act provided that Representatives in Congress should be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. It also provided for the election of Representatives by the people at large where a state had been assigned an increased number of Representatives. It also fixed the first Tuesday after the first Monday in November, beginning with the year 1876, as the day for electing Representatives in Congress, this provision being subsequently carried into the Revised Statutes as

a permanent law. It also provided for a method of filling vacancies on account of death or resignation in Congress. It also provided for the enforcement of the Fourteenth Amendment.

Following the census of 1880 Congress enacted its tenth apportionment act (22 Stat. L. 5). It provided that Representatives in Congress should be elected by districts composed of contiguous territory containing as nearly as practicable an equal number of inhabitants. It increased the number of Representatives and made provision for the election at large of an increased number of Representatives in any state and provided that

> "If the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number to such state hereby provided for shall be elected at large unless the legislature of said state has provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

That Congress intended this law to be temporary in character is evidenced or by its title and from the fact that all of these provisions to which we have referred are limited by the words *"under such apportionment"*.

Following the census of 1890 Congress enacted its eleventh apportionment act (26 Stat. L. 735). It increased the number of Representatives. It contained substantially the same provisions as the Act of 1882. Following the census of 1900 Congress enacted its twelfth apportionment act (31 Stat. L. 733). It increased the number of Representatives. It contained substantially the same provisions as the two preceding acts, both with regard to laying out the states into Congressional Districts and electing representatives at large.

It contained a provision that

> "If the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number in such state hereby provided for shall be elected at large, unless the legislatures of the said

states have provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

and again made it clear that all of these provisions were *"under that apportionment"*.

Following the census of 1910 Congress enacted the thirteenth apportionment act (37 Stat. L. 13), and increased the number of Representatives to 435. This act contained the same provisions with regard to laying states out into Congressional Districts composed of contiguous territory of fairly equal population as the preceding acts. That act, which is the Act of August 8, 1911, again made it clear by its title and by its express terms, that all of these regulations had to do with the election of Representatives in Congress *"under this apportionment"*.

No apportionment of Representatives in Congress was made by the Congress of the United States following the census of 1920. It was evident to Congressional leaders that the House of Representatives, then composed of 435 members, had become unwieldy. It was felt that the membership should not be increased. It was, however, obvious that a reapportionment of the 435 Representatives among the states following the census of 1920 would mean an increased number of Representatives in some states and a decreased number in other states. Representatives in those states which were threatened with a decreased number were unwilling to assent to any proposition which would have that effect. Despite many efforts made by Congressional leaders no apportionment act was passed by Congress following the 1920 census, and consequently the 1911 apportionment remained in force.

Congress finally concluded to return to the solution found in the seventh Congressional Apportionment Act which became effective May 23, 1850 (9 Stat. L. 433). It was not known prior to the census of 1930 just how the 435 representatives in Congress might be apportioned. It was believed

at that time, to illustrate, that New York State would lose one representation. (See Debate in the House on Amendment offered by Congressman Reed, Congressional Record, pp. 2443, *et seq.*, Seventy-first Congress, 1929). Congress finally enacted the Law of June 18, 1929, which, in effect, apportioned to the various states a total of 435 representatives in Congress in the manner and form by that Statute provided, as a result of which New York State gained two seats in the House. Eleven states in all gained seats while twenty-one states lost seats in the House. The largest gain was by California of nine sets. The largest loss was by Missouri of three seats.

It is obvious from this historical review of the action of Congress following each census, with the exception of the census of 1930, that the apportionment acts thus enacted were intended to be temporary statutes limited by its title and express terms to the instant apportionment until the next census and the apportionment of representatives thereunder, by a new apportionment act.

Congress failed in 1929, as it did in 1850 by the Act effective May 23, 1850 (9 Stat. L. 433), to do more than was done by the first five apportionment acts, namely, to apportion to the various states of the Union the number of representatives to which each state shall be entitled in the Seventy-third and succeeding Congresses of the United States, leaving it entirely to the legislatures of the various states to provide for the election of these representatives in Congress in accordance with the provisions of Section 4 of Article I of the Constitution.

Nor was the situation changed by the inclusion of the Act of August 8, 1911, in the Code of Laws of the United States, where it was incorporated in Title 2 of the Code of Laws, Sections 2, 3, 4 and 5.

The Code of Laws of the United States is entitled "An Act to Consolidate, Codify, and Set Forth General and Permanent Laws of the United States in force December Seventh, One Thousand Nine Hundred and Twenty-five" (Chap. 713,

44 Stat. 773). Section 2 of Title 2 of the Code of Laws was identical with Section 2 of the Act of August 8, 1911, except that it included the two representatives from the newly admitted states of Arizona and New Mexico. It apportioned to the various states the number of representatives enumerated. Section 3 of Title 2 was Section 3 of the Act of August 8, 1911, and included the same language exactly as in the original Act "that in each state entitled *under this apportionment* to more than one representative" they shall be elected by compact and contiguous districts of fairly equal population.

Section 4 of Title 2 of the Code of Laws is Section 4 of the Act of August 8, 1911, and repeats the language of the Act "that in case of an increase in the number of representatives in any state *under this* apportionment" such additional representatives shall be elected in districts now prescribed by law until such state shall redistrict in the manner provided by the laws thereof. It is *conceded* that Sections 1 and 2 of the 1911 Act are no longer in force. Unquestionably Sections 3 and 4 have likewise expired.

The codifiers did not intend to change the provisions of the Act of August 8, 1911, nor did they have any power to do so. Section 2 (a) of the Act of Congress under which the codification was made (Chap. 713, 44 Stat. 773) provides as follows:

> "but nothing in this action shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

Nor does the Code of Laws pretend to include only laws which are both "general" and "permanent". It includes laws permanent but *local* as well as laws general but temporary.

Title 3, Ch. 3, dealing with "White House Police" is illustrative of a permanent but local law.

It was urged below that the debate in Congress on the amendment proposed by Congressman Reed of New York to the act of June 18, 1929, supports the contention that that law is still in force.

It is too well settled to require citation of authority that debates of members of a legislative body are not appropriate sources of information to discover the meaning of the language of the statute.

But if this debate be examined it will be found that the ruling of the chair was directly contrary to the inference drawn by respondents.

The Act of June 18, 1929, was before the House for discussion in June, 1929. There had been no redistricting of the State of New York for many years. The census of 1930 confirmed what was generally known, that the shifting of population had created grossly disproportionate districts. One Congressional District the 12th contained only 90,671 of population; Cong. Dir. January, 1932 (p. 72); the 23d Congressional District contained a population of 688,454. *Ibid* (p. 75) the 2nd District contained 776,425 (p. 69); the 1st, 637,002 (p. 69); the 8th, 799,407 (p. 71); the 13th, 111,696 (p. 73); the 14th, 119,794 (p. 73); the 15th, 121,675 (p. 73); Cong. Dir. January, 1932 (p. 72).

Congressman Reed sought to so amend the Act then under discussion, which dealt with an apportionment of representatives in Congress to be made following the 1930 census, *as would in effect,* amend the law of August 8, 1911, so as to permit his State (of New York) to *immediately* redistrict the State under that (1911) apportionment *for the Seventy-second Congress.*

The amendment was ruled out of order, and the Chair, in so ruling, specifically pointed out as follows (Congressional Record, Seventy-first Congress, First Session, June 6, 1929; Vol. 71, No. 42, p. 2445):

"In addition, the Chair calls attention to the language of the Act of August 8, 1911, in Section 4:

> That in case of an increase in the number of representatives in any State under this apportionment, such additional Representative or Representatives shall be elected—

"And so forth. And to the language in Section 3:

> That in each state entitled under this apportionment to more than one Representative—

"And so forth.

"All the way through every provision of the act of August 8, 1911, relates to 'this apportionment'; that is, the apportionment provided for in the act of August 8, 1911.

"Therefore, it seems to the Chair very clearly that the amendment offered by the gentleman from New York (Mr. Reed) is not germane to the pending bill; and the Chair sustains the point of order."

It will be noted that the Chair in ruling the amendment out of order specifically and clearly called attention to the fact that the Act of August 8, 1911 related to "this apportionment"; that is the apportionment provided for in the Act of August 8, 1911, *and to no other*. If any inference is to be drawn from the debate and the ruling of the Chairman, it is that the Chair recognized that the Act of August 8, 1911 was limited to the Apportionment of 1911 and would expire with the apportionment about to be made by the Act of 1929 then under discussion.

Nor can the Act of 1911 be applied to the present situation. On August 8, 1911, New York was divided into 37 Congressional districts. By Ch. 890 Laws (N. Y.) 1911, which repealed all prior apportionment acts the State was divided into 43 districts. It is impossible at this time to restore the 37 districts as they existed on August 8, 1911. If we could, it would be necessary to elect 8 representatives at large instead of 2 as directed by the Court of Appeals.

CONCLUSION.

It is respectfully submitted that the order and judgment should be reversed and the case remanded to the State Court with instructions accordingly.

Respectfully submitted,

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners-Appellants,
10 East 40th Street,
New York City,
New York.

APPENDIX.

37 St. [illegible]

Chap. 5. An Act for the apportionment of Representatives in Congress among the several states under the Thirteenth Census.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows:

Alabama, ten.
Arkansas, seven.
California, eleven.
Colorado, four.
Connecticut, five.
Delaware, one.
Florida, four.
Georgia, twelve.
Idaho, two.
Illinois, twenty-seven.
Indiana, thirteen.
Iowa, eleven.
Kansas, eight.
Kentucky, eleven.
Louisiana, eight.
Maine, four.
Maryland, six.
Massachusetts, sixteen.
Michigan, thirteen.
Minnesota, ten.
Mississippi, eight.
Missouri, sixteen.
Montana, two.
Nebraska, six.

Nevada, one.
New Hampshire, two.
New Jersey, twelve.
New York, forty-three.
North Carolina, ten.
North Dakota, three.
Ohio, twenty-two.
Oklahoma, eight.
Oregon, three.
Pennsylvania, thirty-six.
Rhode Island, three.
South Carolina, seven.
South Dakota, three.
Tennessee, ten.
Texas, eighteen.
Utah, two.
Vermont, two.
Virginia, ten.
Washington, five.
West Virginia, six.
Wisconsin, eleven.
Wyoming, one.

Sec. 2. That if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each, and if one of such Territories shall so become a State such State shall have one Representative, which Representative or Representatives shall be in addition to the number four hundred and thirty-three, as provided in section one of this Act, and all laws and parts of laws in conflict with this section are to that extent hereby repealed.

Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be

elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

Sec. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

Approved, August 8, 1911.